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WM. R. STAN

IN THE

Supreme Court of the United States.

No. 154

C. V. BROWNE, Petitioner,

vs.

UNION PACIFIC RAILROAD COMPANY, Respondent.

ON PETITION FOR CERTIORARI.

Brief of Respondent.

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IN THE

Supreme Court of the United States.

No. 594.

C. V. BROWNE, Petitioner,

vs.

UNION PACIFIC RAILROAD COMPANY, Respondent.

ON PETITION FOR CERTIORARI.

Brief of Respondent.

STATEMENT.

This action was brought to recover damages sustained by reason of alleged reliance placed upon the datings of four shipper's order bills of lading issued by the respondent which datings it was alleged were erroneous.

Petitioner, a Texas grain dealer alleged that he had entered into a written contract to purchase 10,000 bushels of

wheat from a Denver grain company, which was to be shipped on or before a specified date. That he thereafter entered into a written contract to sell another Texas grain dealer 5000 bushels of the wheat to be shipped on or before the same date specified in the first contract, delivery to be made in Texas. The Denver Company, vendor under the first contract, presented to the petitioner for payment four sight drafts to which were attached four shipper's order bills of lading each reciting receipt of a carload shipment of wheat by the respondent at Denver, petitioner paid the drafts and received the bills of lading which had been issued and signed by respondent's agent, and he alleges he would not have done this had not the bills of lading shown by their dating that the shipments had been made within the time specified in the two contracts he had previously entered into. That he thereafter tendered the four bills of lading to the Texas dealer in accordance with the terms of the second contract but that acceptance was declined by the latter on the ground that the bills of lading were incorrectly dated and that the wheat had not been shipped as they represented on or before the dates specified in the contracts. That as a result petitioner was compelled to sell the wheat at a loss, to his damage.

Petitioner further alleged that before he learned of the incorrect datings, the Denver Company became insolvnt and that he was damaged by reason of the fault of petitioner in issuing incorrect order bills of lading which were negotiated by him for value and upon which he placed reliance without knowledge of their incorrectness when he became the lawful holder thereof.

The petitioner set up as exhibits attached to his petition below exact copies of the two contracts covering the sale and purchase of the grain in question. The contract between petitioner and the Denver Company contained the provision:

> "Grain not shipped within specified time contract will be considered open until shipped unless we have been advised the same has been cancelled."

The petitioner did not allege that he had, prior to the time of shipment, cancelled the contract.

Respondent's answer admitted the execution of the contracts but set up the following defenses:

> Second: That under the terms of the contract between petitioner and the Denver Company the former was bound to accept the shipments regardless of the dating of the bills of lading, no allegations having been made by petitioner that any notice of cancellation had been given the Denver company prior to the time of shipment.
>
> Third: That respondent at no time had any knowledge of any contracts between petitioner and others either specific or by reason of custom or usage and that it did not and could not know any special reliance would be placed by anyone on the dating of the bills of lading.
>
> Fourth: That if the bills of lading were misdated this was done by the Denver Company who filled in the customary forms, presenting them to the respondent during the rush of business for signature only; that it was without the scope of authority of respondent's agent to bind the company by signing bills of lading containing any false statements; that such bills described the shipments accurately, stated their weight correctly and that the shipments were carried through to destination promptly and were fully delivered to the order of petitioner at destination.

Fifth: That had petitioner awaited the arrival of the shipments at destination before taking up the drafts he would have been fully informed of the original points of origin of the shipments in Idaho and the dating of the Ogden, Utah, bills by notations on the statements for freight charges which would have been presented to him for payment in usual course. That in any event the petitioner should have been warned of the probability of misdating of the Denver bills by reason of the late arrival of the bills of lading and shipments.

Sixth: That the petitioner failed to take any precautions whatever to keep down the amount of damages, he alleged he sustained, by a prompt sale of the shipments on prevailing markets.

Petitioner filed a general demurrer and a special demurrer to the third, fourth and fifth paragraphs of Respondent's answer, which demurrers were by the trial court overruled. Petitioner thereupon elected to stand upon his demurrers and judgment was rendered against him for costs. He thereupon appealed to the Supreme Court of Kansas, which held the demurrers were properly overruled as to all of the defenses set up in respondent's answer, and affirmed the judgment rendered by the trial court. The Kansas Appellate Court after holding specifically that the defense set up in the fourth paragraph of respondent's answer was good, used the following language with reference to the other defenses set up:

"The fact, if correct, that plaintiff was bound to accept the shipments from the Ed Past Grain Company, may not be a complete defense to plaintiff's cause of action, but it does raise an issue which may become important on the measure of damages if any are recoverable in the action. And whether there was a custom of grain dealers to rely on the datings

of bills of lading, of which the carrier had notice or was bound to take notice, was also a question of fact, and therefore not demurrable. The scope of the powers of defendant's agent at Denver could not be determined by demurrer; and neither could the matters pleaded in the fifth paragraph of the answer summarized above."

Petition for a rehearing was thereafter filed, which petition was denied on the 10th day of July, 1923.

On the 26th day of October, 1923, petitioner served notice of the filing of a petition for a writ of certiorari.

The only ruling of the State courts complained of is that with reference to the fourth paragraph of respondent's answer, although the appellate court below also specifically held the other defenses set up were not demurable.

ARGUMENT.

The writ prayed for should be denied for the following reasons:

(a) The decision of the Kansas Court that respondent's answer was sufficient to permit the examination and determination of the case, involving as it did only questions of local pleading and practice presents no federal question. (Railroad Co. v. Butler, 159 U. S. 87; 15 Sup. Ct. 991). In the case of Ry. Co. v. Iowa, 160 U. S. 389, 16 Sup. Ct. 344, it was held:

> "This court has no power to review a decision of a state court that the averments of an answer in a pending case set forth no defense to the plaintiff's claim."

The judgment of the trial court against petitioner below was solely caused by reason of his determination to stand upon his demurrer to respondent's answer, which the court had overruled. Hence, the judgment was based upon a construction of the pleadings and will not be considered by this court for the reason that only matters of state pleading and practice are involved.

Had the petitioner submitted to the ruling of the court on the pleadings and had the court thereafter, upon the trial of the issues thus made, unduly restricted petitioner's evidence or given improper instructions relative to the sole federal question here contended for by petitioner, then upon final judgment against the petitioner at the end of the suit, and affirmance thereof by

the State Supreme Court this court would have had jurisdiction. As petitioner did not pursue this course the writ should be denied.

(b) The ruling of the trial court that petitioner's demurrer to the fourth paragraph of respondent's answer should be overruled, which petitioner here presents as a final determination below of the sole federal question adversely to him, was obviously correct, disregarding the fact that only a matter of state pleading and practice was involved, for the reason that the liability of the respondent upon the bills of lading, if any, could not be determined without proof of facts denied in respondent's answer.

Paragraph IV of respondent's answer specifically denies that it was within the scope of the authority of its agents to sign the bills of lading. Section 22 of the Pomerene Bills of Lading Act (39 Stat. at L. Ch. 415 P. 538) relied upon by petitioner as establishing respondent's liability provides "That if a bill of lading has been issued by a carrier or on his behalf by an agent or employee *the scope of whose actual or apparent authority* includes . . . . . the issuing of bills of lading", the liability shall be as provided thereinafter. The trial court overruled petitioner's demurrer without opinion and upon the urgent request of counsel for petitioner the Kansas Supreme Court passed upon the precise question petitioner now presents here, but the latter court in its opinion holds:

"The scope of the powers of defendant's agent at Denver could not be determined by demurrer." (page 730.)

Therefore, as stated, disregarding the fact that this was a positive determination of a matter of state pleading and practice by a State Court, it is obvious that this court cannot review the question owing to an absence from the record of essential findings of fact.

(c) The writ should be denied for the reason that the decision upon the Federal question now urged upon this court was not necessary to support the judgment of the court below and even though the decision on the particular point here presented was erroneous, the judgment is supported upon other grounds adequate in themselves and containing no Federal questions.

First. As shown by the opinion of the Supreme Court of Kansas, the first part of the opinion dealing with the Federal question here contended for was considered by that court as obiter for the reason that the demurrer to respondent's answer upon which the judgment below was based, was held properly overruled as to all of the other non federal defenses set up by respondent.

Second. The second paragraph of respondent's answer set up the defense that petitioner, under the terms of the contract made a part of his petition, was bound to accept the shipments, which he alleged he would not have accepted had the bills of lading borne what he thereafter considered correct datings. This defense involved only the interpretation of a contractural relation-

ship between petitioner and the Denver Company relative to the shipments, and was not a federal question. Of this the Kansas Supreme Court in its opinion in this case says:

> "The fact, if correct, that plaintiff was bound to accept the shipments from the Ed Past Grain Company (The Denver Company) may not be a complete defense to plaintiff's cause of action, *but it does raise an issue which may become important,* on the measure of damages if any are recoverable in the action".

Third: Relative to respondent's third defense the Kansas appellate court says:

> "And whether there was a custom of grain dealers to rely on the datings of bills of lading, of which the carrier had notice or was bound to take notice was also a question of fact and therefore not demurrable."

Fourth: Relative to respondent's fourth and fifth defenses, the Kansas Supreme Court says:

> "The scope of the powers of defendant's agent at Denver could not be determined by demurrer; and neither could the matters pleaded in the fifth paragraph of the answer summarized above."

That this court will not review a federal question where there is adequate basis for the state court ruling on other non-federal questions, even though the federal question contended for was erroneously decided by the court below, is settled law. Railroad Company v. Bank 207 U. S. 270; Ry. Co. v. Washburn Co., 254 U. S. 370; Enterprise Irrigation Dist. v. Canal Co., 243 U. S. 157.

(d) The question here insisted upon even if it should be now considered by this court and if further, the holding of the Kansas Supreme Court upon it should be held erroneous, still the measure of damages and other matters of proof could not be determined for the reason that petitioner, having an opportunity to present his evidence on all questions, elected to waive it and permitted judgment to be rendered against him. This appeal is therefore upon a moot question.

(e) The writ should be denied for the reason that it is obviously the law that the dating of an interstate shippers order bill of lading is not a part of the description of the goods mentioned therein and the Federal Act of June 5th, 1916 (39 U. S. Stat. Ch. 415 p. 538) has not changed the rule announced in Atchison etc. Ry. Co. v. Harold 241 U. S. 371, touching an innocent holder's right of action against the issuing carrier for misdating such order bill.

At the time the Harold case was decided, interstate shipper's order bills were not negotiable instruments. Thereafter Congress passed the Pomerene Bills of Lading Act, cited supra. Plaintiff's position can be supported on two theories only. First that order bills of lading are unqualified negotiable instruments, and second that the liability for misdating is fixed by Section 22 of the act. A mere reading of the act is sufficient to show that neither of the two theories are sound.

Relative to the first, Section 3 of the act states that such bills shall have certain attributes of negotiable instruments "within the meaning of the act" and this

court has held them to have "Certain characteristics of negotiable paper" and "attributes of commercial paper." Railway Co. v. French, 254 U. S. 538, 544, 545. From this alone it is too clear for further comment that petitioner's first contention must fail.

As to Petitioner's second contention that Section 22 of the Pomerene Bills of Lading Act imposes liability, a reading of that section discloses the falacy of such an argument. It is as follows.

> "That if a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the receiving of goods and issuing bills of lading therefor for transportation in commerce among the several States and with foreign nations, the carrier shall be liable to . . . (b) the holder of an order bill, who has given value in good faith, relying upon the description therein of the goods, for damages caused by the nonreceipt by the carrier of all or part of the goods or their failure to correspond with the description thereof in the bill at the time of its issue."

Petitioner contends that the words "Description of the goods" includes the dating, but as the Kansas Supreme Court so aptly puts it:

> "It would be an undue extension of the statutory words 'description of the goods' to say that the date of shipment of the goods as shown by the bill of lading is part of the description. A description of a carload of goods is a statement or recital of their character, of their sort, kind or species."

That Federal cours will not broaden the scope of the act by construction is indicated in Leigh Ellis Co. v. Payne Agent, 274 Fed. 443, where it was held:

"Under Bills of Lading Act Aug. 29, 1916, Sec. 20 (Comp. St. Sec. 8604 jj), where a carrier loads package freight, like cotton in bales, it, is required to state in the bill of lading only the number of packages and such marks or description as will serve to identify them, and a further statement in an order bill for baled cotton of the weight of the shipment is voluntary and gratuitous, and where qualified by the words 'subject to correction' does not render the carrier liable to a holder of the bill under section 22 (section 8604kk) for a shortage in the weight."

The latter part of sub-section (b) of section 22 is the vital portion of the act and states specifically that the carrier's liability shall be "for damages caused by nonreceipt by the carrier of all or part of the *goods* or their failure to correspond with *the description thereof* in the bill of lading at the time of its issue." Congress by thus specifically defining the liabiliy of a carrier issuing an order bill of lading clearly intended that there should be no further liability. "Expressio unius est exlusio alterius", and where a Federal statute is thus not ambiguous there is no room for construction (U. S. v. Wiltberger, 5 Wheat 77, 95, 96.) Nor can its plain words be supplanted by speculation concerning the policy of Congress. (Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, 36, 37.)

The congressional record conclusively shows the Pomerene Bills of Lading Act was passed by the Senate prior to the time the decision in the Harold case was handed down by this court, and that the act was passed to correct the practice of unscrupulous persons who had issued order bills of lading as purported representatives of carrier companies without the companies having re-

ceived any goods whatever. It cannot be questioned but that the act was admirably adequate in this respect.

Petitioner in his petition here and in his brief sets up many reasons why the obiter dictum holding of the Kansas Supreme Court on the Federal question contended for should be reviewed by this court, relative to the customs of grain dealers, and milling companies, in making and receiving consignments of wheat on shipper's order bills of lading. Also many assertions of fact are made relative to the reliance placed upon the dating of order bills of lading. However, as judgment below was based entirely upon a finding as to the adequacy of the pleadings, such facts and illustrative situations presented by petitioner are entirely outside of the record. Citations of authority to the effect that this court will only consider matters properly presented by the record before it are unnecessary and statements of counsel are therefore ineffective.

In preparing this brief counsel for respondent have not had before them a copy of the record in this case and for that reason have been unable to furnish citations to the various parts of the record quoted from or referred to herein.

We respectfully submit the petition for writ of certiorari should be denied.

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